Supreme Court, U.S.
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CLERK

88-770

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

THE PULITZER PUBLISHING COMPANY
and MARIANNA RILEY,
*Petitioners,*

vs.

THE HONORABLE LESTER W. DUGGAN,
Circuit Judge for the Circuit Court
of St. Charles County,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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## QUESTION PRESENTED

Does the First Amendment prohibit the sealing of grand jurors' names from public inspection by a state trial court where the history of the grand jury demonstrates that the names of grand jurors have always been open and known to the public and the trial court fails to make specific factual findings why such closure is necessary to further a compelling governmental interest?

## RULE 28.1 LIST

The petitioner The Pulitzer Publishing Company has no parent company. The Pulitzer Publishing Company has no affiliates or subsidiaries other than wholly-owned subsidiaries.

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and MARIANNA RILEY,
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THE HONORABLE LESTER W. DUGGAN,
Circuit Judge for the Circuit Court
of St. Charles County,
*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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The petitioners The Pulitzer Publishing Company and Marianna Riley respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Missouri entered in the above-entitled case on September 13, 1988. Alternatively, petitioners pray that the Court summarily reverse the decision of the Supreme Court of Missouri.

### OPINIONS BELOW

On June 21 and June 30, 1988 the Circuit Court for St. Charles County, Missouri issued two unreported orders *sua sponte* prohibiting the disclosure of the names of grand jurors. Appendix, *infra*, pp. 1a and 2a. On July 7, 1988, the Missouri Court of Appeals for the Eastern District, without opinion, denied petitioners' request for a writ of mandamus to compel

the Circuit Court to disclose the names (Appellate No. 55009). Appendix, *infra,* p. 3a. The Supreme Court of Missouri, without opinion, also denied the petition for a writ of mandamus on September 13, 1988 (Mo.Sup.Ct. No. 70755). Appendix, *infra,* p. 5a.

## JURISDICTIONAL STATEMENT

The judgment of the Missouri Supreme Court was entered on September 13, 1988. Appendix, *infra,* p. 5a. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) (1986). This Court may issue a writ of certiorari to review a judgment by the state's highest court denying a writ of mandamus. *Hartman v. Greenhow,* 102 U.S. 672, 675-76 (1881).

## CONSTITUTIONAL PROVISIONS

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> U.S. Const. amend. I

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S. Const. amend. XIV, § 1, clause 2

## STATEMENT OF THE CASE

On June 20, 1988, respondent, the Honorable Lester W. Duggan, Circuit Judge for the Circuit Court of St. Charles County, Missouri, convened a grand jury. The grand jury was convened for the single purpose of investigating James H. Williams Sr. and his wife, JoAnn Williams. The Williams were accused in the murder of Walter Scott, JoAnn Williams former husband. James Williams was also accused of killing his ex-wife, Sharon Williams. *Grand Jury is Convened in Scott Murder Case,* St. Louis Post Dispatch, Oct. 11, 1988 (St. Charles zone edition, known as the "St. Charles Post"). Appendix, *infra,* p. 9a. According to a news report, Judge Duggan angered his judicial colleagues by not consulting them before he acted. *Id.* Judge Duggan ordered the county sheriff to select the grand jurors rather than utilizing the county board of jury commissioners.[1] A grand jury had not been held in St. Charles County since 1978.[2]

---

[1] Missouri law provides for two methods of selecting a grand jury. Mo.Rev.Stat. §540.020 (1986). The first method provides that the jurors are selected by a board of jury commissioners. Under this method the names are drawn out of a box publicly, Mo.Rev.Stat. §494.250 (1986), and their names are recorded in the records of the county commission. Mo.Rev.Stat. §494.280. Had the grand jurors been selected in this fashion the record of their names would be open to the public.

The grand jurors, however, were selected by an alternative procedure whereby the judge ordered the sheriff to summon the grand jurors. Mo.Rev.Stat. §540.020. The provision for selection of grand jurors by the sheriff is silent as to recording the names of the jurors.

[2] The names of the grand jury empanelled in 1978 were made available to the public and were published in the local newspaper. *Grand Jury is Chosen; May Investigate Judge,* St. Louis Post Dispatch, p. 1, Oct. 11, 1978 (St. Charles zone edition, known as the "St. Charles Post"). Appendix, *infra,* p. 6a.

On June 20, 1988 and again on June 21, 1988 petitioner Marianna Riley, a reporter for the *St. Louis Post-Dispatch* newspaper (owned by petitioner Pulitzer Publishing Company), attempted to acquire the names of the members of the grand jury from Judge Duggan. Judge Duggan refused to allow Riley to see the names and informed her that that information would not be released to her or the public.

Thereafter, Judge Duggan, *sua sponte,* signed two orders respectively filed-stamped June 21, 1988 and June 30, 1988, which ordered that the names of the grand jurors be a closed record and not available to the public. Appendix, *infra,* pp. 1a and 2a. The Circuit Court's actions were taken without notice to the petitioners and they had no opportunity to argue in opposition to the court's action. The Circuit Court made no factual findings on the need for such an order and generally stated its reasons for such an order being the safety of the individual grand jurors and the jurors' oath of secrecy.

On June 23, 1988 petitioners filed a petition for a writ of mandamus in the Missouri Court of Appeals, Eastern Division, to compel Judge Duggan to allow inspection of the names of the grand jurors. Petitioners raised their First Amendment argument in that court and cited in support thereof this Court's decisions in *Press-Enterprise v. Superior Court of California, Riverside County,* 464 U.S. 501 (1984) and *Press-Enterprise v. Superior Court of California For Riverside County,* 478 U.S. 1 (1986). (Suggestions in Support of Petition for Writ of Mandamus or, in the Alternative, Petition for Writ of Prohibition, in the Missouri Court of Appeals, Eastern District, pp. 3-4). The Missouri Court of Appeals denied the petition for writ of mandamus on July 7, 1988, although one judge in the three judge panel would have issued the writ. Appendix, *infra,* p. 3a.

On July 11, 1988 petitioners filed their petition for writ of mandamus in the Missouri Supreme Court. Once again petitioners raised their right to inspect the grand jurors' names

under the First Amendment to the Constitution of the United States. (Suggestions in Support of Petition for Writ of Mandamus or, in the Alternative, Petition for Writ of Prohibition, in the Missouri Supreme Court, pp. 3-10). The Missouri Supreme Court denied the petition on September 13, 1988. No opinion was issued with the denial in the court of appeals or the Missouri Supreme Court. The decision of the Missouri Supreme Court is a final decision of the highest court in the State of Missouri and is not subject to further review except by petition for a writ of certiorari filed in the United States Supreme Court. The Circuit Court's orders are not subject to further direct or collateral review in the Missouri courts.

## REASONS FOR GRANTING THE WRIT

### Introduction

The closed nature of grand jury proceedings is an exception to the openness expected in our public institutions and, particularly, the criminal process. This exception is tolerated only because secrecy is essential to the grand jury's function as a shield against overzealous and unfounded government prosecution. Thus, because the grand jury's operation is veiled in secrecy, the public's confidence in its ability to protect individuals from untoward prosecution rests entirely on the public's confidence in those persons chosen to serve as grand jurors.

Petitioners do not seek to intrude into the functioning of the grand jury. Petitioners seek only the names of those persons chosen to serve on the grand jury. If the names of the grand jurors remain sealed, without the articulation of a compelling reason for the closure, the grand jury will be nothing more than a new star-chamber where secret participants may conduct secret proceedings with the power to indict for crimes. Not only would such a body be unworthy of public trust, it should be seen with fear.

Petitioners have been unable to locate any reported case discussing the public's First Amendment right of access to the names of grand jurors. This is an important question of constitutional law which has not been, but should be, settled by this Court. Sup.Ct.R. 17.2(c).

### Right of Access

This Court has held that when a stage in a criminal process has been historically open to the press and general public, the public enjoys a presumption of access under the First Amendment. *Press-Enterprise Co. v. Superior Court of California for Riverside County,* 478 U.S. 1, 7-8 (1986) (*Press-Enterprise II*); *Press-Enterprise Co. v. Superior Court of California, Riverside*

*County*, 464 U.S. 501, 508-510 (1984) (*Press-Enterprise I*); *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 603-606 (1982). In determining whether a First Amendment right of access attaches to a particular stage of the criminal process the Court has emphasized two complementary considerations. *Press-Enterprise II*, 478 U.S. at 8. First, the Court has "considered whether the place and process has historically been open to the press and general public." *Id.* Second, the Court considers "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*

**Historical Openness**

The grand jury has its origin in Twelfth Century England with King Henry II's issuance of the Assize of Clarendon in 1166. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 Amer.Crim.L.Rev. 701, 707 (1972). The early grand jury was established in order to make presentments based not on outside witnesses but on the grand jurors' own knowledge. Thompson & Merriam, *A Treatise on the Organization, Custody and Conduct of Juries, Including Grand Juries*, §467 (1882). Thus, the grand jury was drawn from the neighborhood and the names of the grand jurors would be known to everyone in the area. Morse, *A Survey of the Grand Jury System*, 10 Or.L.Rev. 101, 116 (1931); *see In re the Baltimore Sun Co.*, 841 F.2d 74, 75 (4th Cir. 1988) (discussing development of jury system and public right of access to names of petit jurors). Not surprisingly, the contemporary record of the openness of grand jurors' names is sparse because there was little reason to record what everybody knew. *See Press-Enterprise I*, 478 U.S. at 507 n.5. Such references do, however, exist.

The selection process for the grand jury in the middle Fifteenth Century evidences the openness of the grand jurors' names.

> Arriving in the Shire Hall, the justices took their place upon the bench whilst the constables, bailiffs, jurors, suitors, and others crowded into the court room . . . .
>
> * * * *
>
> The jury for the body of the county or grand jury as it became known, and the juries for the commotes or hundreds and boroughs were then sworn.
>
> * * * *
>
> From the paper lists which he had received from the sheriff, *the clerk called the names of the jurors,* sometimes indicating the fine imposed upon those who were absent, usually a shilling in the case of "grand" and commotal jurors . . . . In the events of an insufficient number of jurors being present in court, the justices could order suitably qualified persons standing round in the court, *de circumstantibus,* to be added in order to make up the jury.

1 *Calendar of the Caernarvonshire Quarter Session Records, 1541-1558,* pp. lxxxix-xc (W. Williams ed. 1956) (emphasis supplied). This process of publicly calling the names of the grand jurors in open court continued through the time of the American Revolution. *See* J. Beattie, *Crime and the Courts in England 1660-1800,* p. 318 (1986). Indeed, anecdotal notations made by the Cheshire county clerk reveal the openness of the grand jurors' identity.

> [T]he jurors were offered hospitality each evening in one of the better inns at the session town, but this can hardly have been the main attraction of service on the jury . . . . Indeed, the grand juries' carousings were often disturbed. In 1628, as the jury sat down to supper, they found themselves confronted by an irate gentleman-litigant, himself flushed with wine, who proceeded to abuse them in word and gesture. In October 1641, the jury was entertained by a troupe of minstrels whose offensive political ballads upset their digestion.

J. Morrill, *The Cheshire Grand Jury 1625-1659,* p. 19 & n.35 (1976) (citations omitted). The criminal procedure also reveals that the names of the grand jurors were commonly known.

> Also it seems, that anyone who is under a prosecution for any crime whatsoever, may, by the common law, *before* he is indicted, challenge any of the persons returned on the Grand Jury, as being outlawed for felony, etc. or villains, or returned at the instance of a prosecutor, or not returned by the proper officer, etc.

W. Hawkins, *A Treatise of the Pleas of the Crown,* p. 295 (8th ed. 1824).

The American grand jury is the direct descendant of the English grand jury. Schwartz, *supra,* at 701. Accordingly, the same openness in the identity of the grand jurors would be expected. Indeed, the first grand jurors selected in the Massachusetts Bay Colony were elected at town meetings. R. Younger, *The People's Panel,* p. 6 (1963); *Acts and Laws, of His Majesties Province on the Massachusetts Bay, in New England* 144 (Green & Allen 1699). The same selection process was followed at the New Plymouth colony. Younger, *supra,* at 7. This procedure of electing grand jurors at a town meeting was also followed in New Hampshire, *Laws of the State of New Hampshire,* 103 (Melcher 1792), and Rhode Island. *The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations 1647-1719,* p. 152 (J. Cushing ed. 1977). Grand jurors in Connecticut were elected by selectmen. *Acts and Laws of Connecticut 1716-1749,* p. 536 (A. Bates ed. 1919). In Georgia the names of grand jurors were drawn from a box and the clerk would publicly call out their names. 18 *The Colonial Records of the State of Georgia, Statutes Enacted 1754-1768,* pp. 144-157 (1910). In South Carolina, the names of the venire from which the grand jurors were to be drawn were published with the statute. 2 *The Earliest Laws of South Carolina 1692-1734,* pp. 42-44 (J. Cushing ed. 1978). Thus, the same at-

mosphere of openness with regard to the names of grand jurors prevailed in America.

**Positive Role of Access**

The second element to be considered, after the historical record, is "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II,* 478 U.S. at 8. At this juncture it is important to emphasize that petitioners are not seeking access to the grand jury sessions which have historically been closed from public view, *id.*, but are only seeking access to the names of the grand jurors. Access to the names of grand jurors is essential to continued public confidence in the grand jury system. The grand jury gained acceptance in England and was adopted in America as a shield against unfounded oppression. Schwartz, *supra,* at 701. Thus, the public's continued faith in the grand jury system is inestricably tied to their faith in those chosen to sit as grand jurors.

> Whether it be Lord or Commoner that is Indicted, the Law intends (as near as may be) that his equals that Judge him, should be his Companions, known to him, and he to them, or at least his Neighbors or Dwellers near about the place where the Crime is supposed to have been committed . . . .

Lord John Somers, *The Security of English-Mens Lives, or the Trust, Power, and Duty of the Grand Jurys of England,* p. 11 (1681). If those who serve on the grand jury should become anonymous, no reason would remain to trust the grand jury to serve its historical function.

**Presumed Open Absent Overriding Government Interest**

Accordingly, access to the names of those serving on the grand jury should be presumed open. Only in limited instances may this presumption of openness be overridden.

> [T]he presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with specific findings enough that a reviewing court can determine whether the closure order was properly entered.

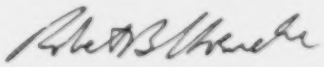
*Press-Enterprise I*, 464 U.S. at 510. The Circuit Court's orders fall far short of this standard. Appendix, *infra*, p. 1a and 2a. The orders of the Circuit Court are so general that they could be applied to virtually every grand jury convened anywhere in the country. They provide no basis whatsoever for a reviewing court to determine that closure was necessary.

The Missouri courts herein have decided an important question of constitutional law which has not been, but should be, settled by this Court. Sup.Ct.R. 17.1(c). Contrary to historical precedent and the decisions of this Court in *Globe Newspaper*, *Press-Enterprise I* and *Press-Enterprise II*, the Missouri courts have ordered sealed the names of grand jurors. Such a decision is inimical to the role of the grand jury in the criminal process and may lead to the erosion of public confidence in both state and federal grand juries.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: November 3, 1988

# APPENDIX

## APPENDIX

STATE OF MISSOURI )
) SS.
COUNTY OF ST. CHARLES )

IN THE CIRCUIT COURT OF
ST. CHARLES COUNTY, MISSOURI
CIRCUIT JUDGE DIVISION

In The Matter Of:

Grand Jury
April Term, 1988

**ORDER PROHIBITING DISCLOSURE OF IDENTIFYING INFORMATION PERTAINING TO GRAND JURY**

(Filed June 21, 1988)

In the interest of the safety and welfare of the Grand Jury and each member thereof, it is hereby ordered that the names and/or the addresses and any other identifying information with respect to them except that each is a resident of a different township of the County shall be closed records and not available to the public.

The Court finds that the interest in the safety and welfare of the members of the Grand Jury outweighs any right of the public if any to have such information. Further, said Grand Jurors and each of them are bound by law and their respective oaths to maintain confidence and secrecy of certain matters that come to their knowledge and the security of certain matters that come to their knowledge and the security of that duty well be jeopardized or appear to be jeopardized by the disclosure of any identifying information pertaining to any member of the Grand Jury.

/s/ Lester W. Duggan, Jr.
Dated: June 21, 1988 Circuit Judge, Division No. 1

STATE OF MISSOURI )
) SS.
COUNTY OF ST. CHARLES )

IN THE CIRCUIT COURT
OF ST. CHARLES COUNTY, MISSOURI
CIRCUIT JUDGE DIVISION

In The Matter Of:

Grand Jury
April Term, 1988

**ORDER PROHIBITING DISCLOSURE OF IDENTIFYING INFORMATION PERTAINING TO GRAND JURY**

(Filed June 30, 1988)

In the interest of the safety of the venire panel from which the Grand Jury was selected and each member thereof, it is hereby ordered that the names and/or the addresses and any other identifying information with respect to them, except that the panel was selected at random and as equally as possible from the various townships of the County, shall be closed records and not available to the public.

The Court finds that the interest in the safety and welfare of the members of the Grand Jury panel outweighs any right of the public if any to have such information. Further, said Grand Jurors and each of them are bound by law and their respective oaths to maintain confidence and secrecy of certain matters that come to their knowledge and the security of that duty may well be jeopardized or appear to be jeopardized by the disclosure of any identifying information pertaining to any member of the Grand Jury.

/s/ Lester W. Duggan, Jr.
Circuit Judge, Division No. 1

Dated: June 30, 1988

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Appellate No. 55009

State of Missouri ex rel,
The Pulitzer Publishing Company, et al.,
Relators,

vs.

The Honorable Lester W. Duggan,
Division One of the Eleventh Judicial Circuit,
Respondent.

Circuit Court of the County of St. Charles
No. CR188-988F, Div. 1

**ORDER**

Relators have filed a Motion for Waiver of Five-Day Notice and a Petition for Writ of Mandamus or in the alternative Petition for Writ of Prohibition along with Suggestions in Support and Exhibits. The Court DENIES Relator's Motion for Waiver of Five-Day Notice as moot.

Being duly advised in the premises, the Court DENIES Relator's Petition.

SO ORDERED:

July 7, 1983

/s/ HON. GERALD M. SMITH
Presiding Jude
Writ Division Three
Missouri Court of Appeals
Eastern District

Stephan, J., concurs
Satz, J., would issue

cc: Hon. Lester W. Duggan
Mary B. Schultz
William J. Hannah
Richard B. Walsh, Jr.
Donald W. Wolff
Michael A. Turken

No. 70755

IN THE SUPREME COURT OF MISSOURI

September Session, 1988

State ex rel. The Pulitzer Company and
Marianna Riley,
Relators,

vs. MANDAMUS or in the alternative PROHIBITION

Honorable Lester W. Duggan, Judge,
Circuit Court, St. Charles County,
Respondent.

Now at this day, on consideration of the petition for a writ of mandamus or in the alternative prohibition herein to the said respondent _____, it is ordered by the court here that the said petition be, and the same is hereby denied.

STATE OF MISSOURI—Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1988, and on the 13th day of September 1988, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 13th day of September 1988.

/s/ Thomas F. Simon Clerk

THE ST. CHARLES POST

THE ST. CHARLES COUNTY EDITION OF THE POST-DISPATCH

Wednesday, October 11, 1978

# GRAND JURY IS CHOSEN; MAY INVESTIGATE JUDGE

Jurors have been chosen for a grand jury expected to investigate the county's purchase and renovation of the old St. Charles Hotel and conflict-of-interest allegations against Joseph S. Graves, associate judge of the administrative St. Charles County Court.

Donald E. Dalton, presiding judge of the county Circuit Court, selected the jurors Tuesday afternoon after two hours of interviews in the Division Three courtroom.

The jurors were chosen from among 16 county residents who appeared for the proceedings. Twenty-four residents were subpoenaed last month for the jury selection, but seven were excused. One resident failed to appear, authorities said.

Eight of the jurors are residents of St. Charles. Dalton said the jurors represent a cross section of county residents in age and occupation.

Howard V. Jacobs, 43, of 1323 Drummond Court, St. Charles, was named foreman of the jury. Jacobs is a Phillips Tobacco Co. sales manager dealing with military installations.

The other jurors are Jerome A. Burkemper, 13 Briarwood Lane, St. Charles; Richard A. Cook, 42, 18 Olde Coventry Court, St. Charles, a salesman for the Edwin Corp.; Ester L. Cooper, 49, of 2512 Charann, St. Charles, a beautician; Lambert H. Ebbesmeyer, of rural St. Charles; George H. Ehll, 602 Michael Drive, Wentzville; Forest W. Emory, 530 Jackson Street, St. Charles, self-employed in the installation business;

Esther L. Fischer, Ilgrim Avenue, Wentzville; Helen E. Jones, 3417 Robyn Ann Drive, St. Charles County; Robert J. Meyer, 3345 Clemens Drive, St. Charles; Catherine G. Renken, of rural St. Charles; and Lawrence A. Tullock, of rural St. Charles.

The jury will convene again at 8:30 a.m. Tuesday in the Division Three courtroom.

The Circuit Court called for the grand jury at the request of Prosecuting Attorney Ronald J. Boggs of St. Charles County. Boggs' office is investigating the hotel purchase and conflict-of-interest charges.

Boggs says he hopes to present his office's findings to the grand jury. Boggs and Assistant Prosecutor Linda Robinson appeared before the grand jury for about an hour Tuesday.

The County Court purchased the hotel at 205 North Second Street, for about $180,000 in November, using money allocated from an emergency fund generally reserved for unexpected expenses. In addition, the court spent more than $39,000 on renovation without seeking bids, apparently in violation of laws that require competitive bidding.

Of the money spent on renovations, $3,700 went to St. Charles County Electric Co., owned by James Cox, chairman of the county Democratic Committee. County Court judge Graves, Charles L. Schwendemann, presiding judge and the third County Court judge, John L. Hanneke, are Democrats.

Graves, also a member of the county Planning and Zoning Commission, has been under investigation by the prosecuting attorney's office since July, for voting on zoning matters involving the Crossroads Economic Development Corp. Graves was a director of the company and a stockholder at the time. He has resigned as director and announced his intention to sell the stock.

Jacobs said Tuesday that the grand jury would report its findings to the prosecuting attorney's office. The grand jury also can hand up indictments.

Grand juries have the power to subpoena witnesses and records, but the identity of the witnesses and their testimony must be kept secret. All grand jury proceedings are closed to the public.

State law requires that grand juries interview only one witness at a time, but jurors may request that a representative of the prosecuting attorney's office be present during the proceedings.

Gary Soule, and assistant St. Louis County prosecuting attorney and a legal adviser to grand juries there, says grand juries are "nothing more than a reflection of a group of residents of the community."

He said prosecutors sometimes request a grand jury to provide "independent input" on a controversial issue.

ST. CHARLES POST

June 21, 1988

# GRAND JURY CONVENED IN SCOTT MURDER CASE

By Marianna Riley
Of the St. Charles Post

Despite an eleventh hour attempt by defense attorneys to stop it, a grand jury was convened in St. Charles County Circuit Court Monday morning. It is the first time a grand jury has been held in St. Charles County since 1977 and probably the third time ever.

The grand jury was called for a single purpose to investigate the cases of James H. Williams Sr. and his wife, JoAnn Williams. They are accused in the murder of Walter Scott, JoAnn Williams' former husband. Williams is also accused of killing his ex-wife, Sharon Williams.

Scott, a local entertainer, had disappeared in December 1983, and his body was found in a cistern behind the Williams' house in the 5600 block of Gutermuth Road in St. Charles County in April 1987. James Williams owned and lived in the house when Scott disappeared.

The grand jury began its work Monday afternoon.

Michael A. Turken, Williams' attorney, filed a motion asking that the grand jury not be convened. The motion was co-signed by JoAnn Williams' attorney, Donald Wolff.

On Monday morning, that motion was denied by Circuit Judge Lester W. Duggan Jr., the same judge who had isued the order for the grand jury originally.

In doing so, he had rocked the courthouse boat and incurred the wrath of his colleagues for breaking with courthouse tradition. That tradition has always held that such action is made

with the concurrence of all the circuit court judges. But Duggan acted alone and did not consult with the other three circuit judges.

The defense had also filed a motion asking Duggan to disqualify himself because of allegations that his son was a potential witness in the case and had played in Walter Scott's band.

In arguing his motion, Turken said that Duggan's involvement gave the "appearance of bias and prejudice" and in order to be free of any appearance of impropriety, he was asking Duggan to disqualify himself.

Turken asserted that he and Wolff had never been notified that Duggan's son was interviewed by the police and that he had given a statement to the police. He also noted that Duggan had himself once met Scott.

Duggan reacted to the defense claims with uncharacteristic sterness. "I am denying the motion to disqualify," he said. "And I am not going to give testimony. I am denying this for a number of reasons."

When Turken attempted to explain another technicality, Duggan replied, "I am not going to debate this. ... I don't intend to sit here and debate whether I'm doing it right or not. I am denying the motion on its merit."

He noted the short notice given by the defense was "an indescretion to say the least," and later made reference to the motion's being filed "at the 11th hour."

Wolff also argued that preliminary hearing proceedings had already begun in the courtroom of Associate Circuit Court Judge Kathle B. Dudley of Lincoln County when the state began its proceeding to convene a grand jury.

"It was only after an adverse ruling that the state sought a grand jury," defense attorneys said.

They were referring to Dudley's ruling last February that the state could not introduce evidence from an autopsy of the body of Sharon Williams because the body had been exhumed illegal-

ly in Southern Illinois. Since then, the body has been re-exhumed following a different procedure, which the state claims would meet all legal requirements.

Assistant Prosecutor Mark Lee, who is trying the Williams case for the state, has said that he has no intention of calling Duggan's son as a witness. He denied he had "judge shopped," as Turken's motion accused him of doing, and noted the prosecutor was acting under all the state statutes that provided for a grand jury.

"There are no local rules," he said.

By noon Monday, the grand jury was chosen. Twelve jurors and three alternates were chosen from a randomly chosen pool. Those names were narrowed to an equal number of people from each of the county's 14 townships.

Then County Sheriff Edward J. Uebinger drew names of the grand jurors from a drum until he had drawn one name representing 12 townships. The first two alternates represent the remaining town ships and the 15th was drawn at random, said Lee.

Duggan refused to make public the names of the grand jurors. "I don't think it is appropriate for me to release them," he said. "I am not going to do it."

Lee said he had every intention of following the letter of the law and that he had no intention of "subverting the process," as the defense has claimed.

"This is part of the legal process as set forth in the state Constitution and its revised statutes. I think it's high time that this county have this tool available to be used at the proper times," he said.

Before the grand jury was convened Monday, a preliminary hearing for the Williams case was scheduled for June 24, but it will presumably be dropped from the docket.

An indictment from a grand jury means the same thing as a probable cause finding from an associate circuit judge — that enough evidence of guilt exists that the defendants should go to trial for the crime for which they are charged.

Supreme Court, U.S.
FILED
DEC 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-770

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

THE PULITZER PUBLISHING COMPANY and MARIANNA RILEY,
*Petitioners,*

vs.

THE HONORABLE LESTER W. DUGGAN,
Circuit Judge for the Circuit Court of St. Charles County,
*Respondent.*

On Petition for Writ of Certiorari
to the Supreme Court of Missouri

## BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## COUNTERSTATEMENT TO QUESTION PRESENTED

Does a judge in a grand jury proceeding have the discretion to refuse disclosure of the grand jurors' names and addresses after balancing the safety and welfare of the grand jurors' with the public's right to access?

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On Petition for Writ of Certiorari
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## BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

### INTRODUCTION

Missouri's Constitution and Revised Statutes mandate that grand jury proceedings are closed. The entire tone of petitioner's argument implies that the grand jury process was employed as a "grand plan" to conceal the names and addresses of the jurors from the public. Such implications are neither fair nor accurate.

Petitioners' quaint historical arguments are irrelevant in today's complex society and bear little on the question presented. Grand jury proceedings are, by statute (Mo. Rev. Stat. §§540.010-.330), closed to the public and press.

Dictum from *Press Enterprise Co. v. Superior Court,* 478 U.S. 1 (1986) (Press-Enterprises II), a trial proceeding, states "although many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly. A classic example is that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings. *Douglas Oil Co. v. Petrol Stops Northwest,* 441 U.S. 211, (1979)."

## REASONS FOR DENYING THE WRIT

### PETITIONER LACKS STANDING TO CHALLENGE THE JURORS

Mo. Rev. Stat. §§540.060 and 540.070 state that defendants may challenge the array before the grand jurors are sworn. At that time, the court would rule on such challenges. Compliance with the law as to procedures in the selection process or composition of the grand jury is properly done by the courts. The grand jurors' names do not have to be divulged in order to review the make-up of the grand jury.

A unanimous Missouri Supreme Court limited a writ of mandamus to general demographic information where a criminal defendant/relator, similarly charged with murder, demanded jurors names and addresses from a master grand jury list. The court noted that "providing criminal defendants with a wide range of information . . . would generate an unnecessary imposition on the citizens of this state". *State of Missouri ex rel. Garret v. Saitz*, 594 S.W. 2d 606, 608 (Mo. banc 1980).

There is no similar statutory provision allowing anyone, other than those answering to criminal charges, to make challenges. Further, and as petitioners indicate, there is no provision requiring the names, as selected by the Sheriff, (Mo. Rev. Stat. §540.020) to become public record (Petition, p. 3). Thus even under Mo. Rev. Stat. §610.010 - .120 ("Sunshine Law") petitioners lack standing since the information requested is not automatically a public record. Further, even if the names and addresses should be spread upon the county records, the Court in its discretion, could seal that portion with a protective order.

### NO RIGHT OF ACCESS

Lester Duggan, Circuit Judge for the Circuit Court, responded to inquiries from the petitioners requesting access to the names and addresses by stating disclosure was inappropriate

and by issuing the following orders (Exhibits A and B). Both orders specify that the names are not being released in that "the court finds the interest in the safety and welfare of the members of the grand jury outweighs any right of the public if any to have such information." (Exhibit A; see also Exhibit B).

Petitioners indicate that the grand jury system has not been utilized in St. Charles County since 1978 (Petition p. 3). Although the names of the grand jurors were published at that time, the nature of that term and the recent 1988 term were widely disparate. The 1978 grand jury was convened to investigate the purchase and renovation of a building. The 1988 grand jury was convened for the single purpose of investigating a highly publicized, gruesome double homicide. Clearly, public policy dictates that jurors investigating a double homicide would reasonably require a greater level of protection to deliberate and freedom from possible reprisals or pressure by the public or any individual than a grand jury investigating a building purchase.

Further, since the proceedings are closed, Judge Duggan, after considering the testimony and circumstances of the grand jury investigation is the only party able to accurately balance the jurors' safety interests against the public's interest in access to those names.

## NO PRESUMPTION OF OPENNESS

Petitioners urge that the court must articulate specific findings to limit public access (Petition, p. 11). To require specific articulation would necessitate disclosure of some aspect of statutorily closed proceedings. Further, cases cited by petitioners were open trial proceedings and reflected decisions on guilt or innocence. Closed grand juries proceedings, in contrast, are not subject to the same rigid procedural safeguards, since jurors determine only whether or not probable cause exists.

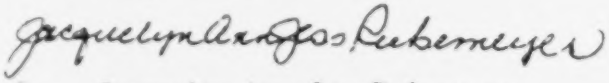
While not controlling, a recent United States Court of Appeals decision, *U.S. v. Scarfo,* 850 F.2d 1015, 1023 (3rd Cir. 1988) in reviewing trial proceedings, stated:

> . . . Because the jury system contemplates that jurors will inconspicuously fade back into the community once their tenure is completed, anonymity would seem entirely consistent with, rather than anathema to, the jury system. In short, we believe the probable merits of the anonymous jury system are worthy not of a presumption of irregularity, but of disinterested appraisal by the courts.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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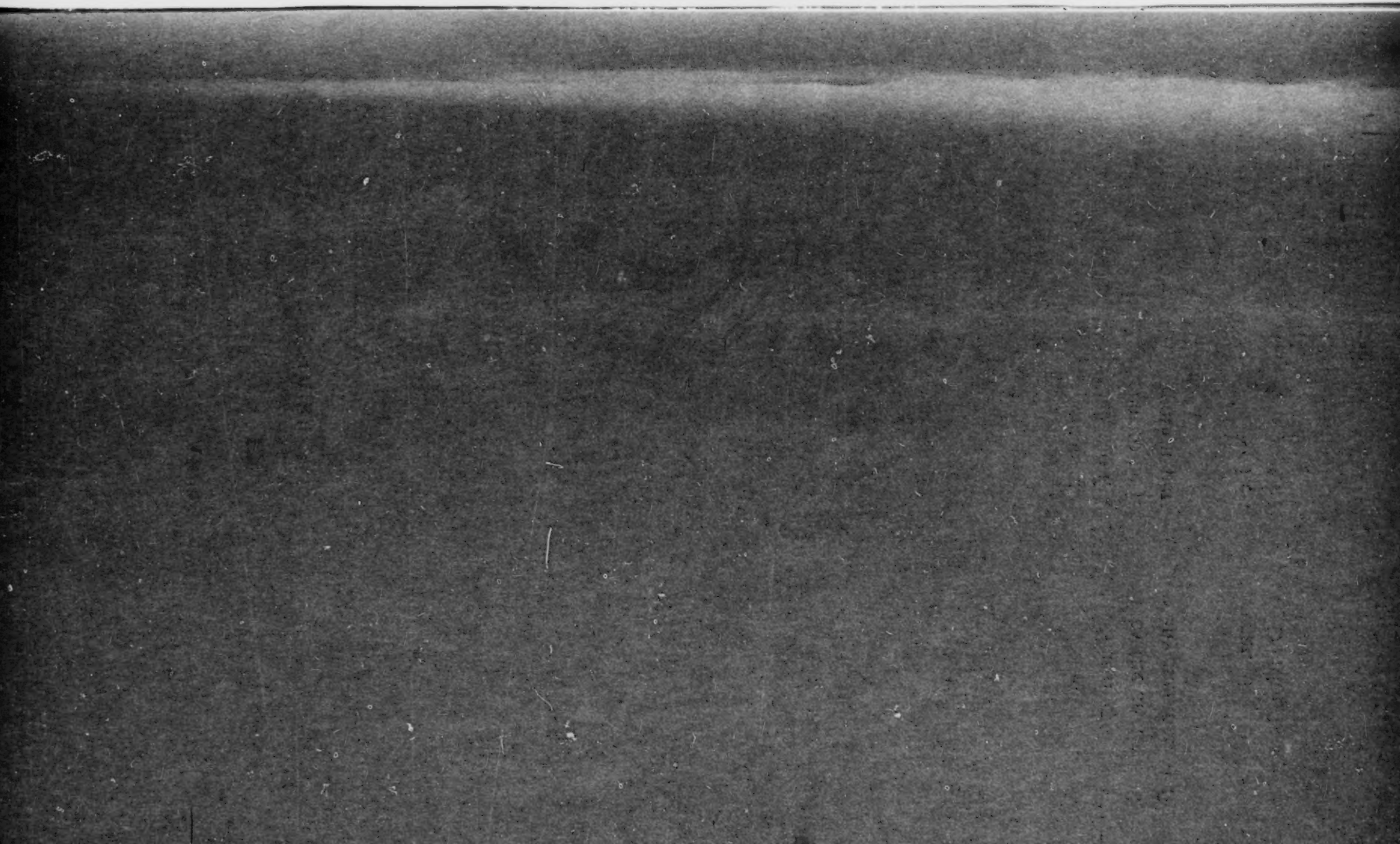
Dated: December 1, 1988

# APPENDIX



## APPENDIX

## EXHIBIT A

STATE OF MISSOURI )
) SS.
COUNTY OF ST. CHARLES )

IN THE CIRCUIT COURT OF
ST. CHARLES COUNTY, MISSOURI
CIRCUIT JUDGE DIVISION

IN THE MATTER OF:

GRAND JURY
APRIL TERM, 1988

**ORDER PROHIBITING DISCLOSURE OF IDENTIFYING INFORMATION PERTAINING TO GRAND JURY**

In the interest of the safety and welfare of the Grand Jury and each member thereof, it is hereby ordered that the names and/or the addresses and any other identifying information with respect to them except that each is a resident of a different township of the County shall be closed records and not available to the public.

The Court finds that the interest in the safety and welfare of the members of the Grand Jury outweighs any right of the public if any to have such information. Further, said Grand Jurors and each of them are bound by law and their respective oaths to maintain confidence and secrecy of certain matters that come to their knowledge and the security of that duty may well be jeopardized or appear to be jeopardized by the disclosure of any identifying information pertaining to any member of the Grand Jury.

/s/ Lester W. Duggan, Jr.
Circuit Judge, Division No. 1

Dated:
June 31, 1988

**EXHIBIT B**

STATE OF MISSOURI )
) SS.
COUNTY OF ST. CHARLES )

IN THE CIRCUIT COURT OF
ST. CHARLES COUNTY, MISSOURI
CIRCUIT JUDGE DIVISION

IN THE MATTER OF:

GRAND JURY
APRIL TERM, 1988

**ORDER PROHIBITING DISCLOSURE OF IDENTIFYING INFORMATION PERTAINING TO GRAND JURY**

In the interest of the safety of the venire panel from which the Grand Jury was selected and each member thereof, it is hereby ordered that the names and/or the addresses and any other identifying information with respect to them, except that the panel was selected at random and as equally as possible from the various townships of the County, shall be closed records and not available to the public.

The Court finds that the interest in the safety and welfare of the members of the Grand Jury panel outweighs any right of the public if any to have such information. Further, said Grand Jurors and each of them are bound by law and their respective oaths to maintain confidence and secrecy of certain matters that come to their knowledge and the security of that duty may well be jeopardized or appear to be jeopardized by the disclosure of any identifying information pertaining to any member of the Grand Jury.

/s/ Lester W. Duggan, Jr.
Circuit Judge, Division No. 1

Dated:
June 30, 1988